Petition

81-1341

Office - Supreme Court, U.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

DEL RIO LAND, INC., WESTERN MATERIALS, INC. and FRANCIS J. BROWN dba F. BROWN & SONS GENERAL ENGINEERING, INC.,

Petitioners,

v.

CITY OF PHOENIX, ARIZONA SAND AND ROCK and CALIFORNIA PORTLAND CEMENT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

John P. Frank
Susan M. Freeman
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003
602/262-5311
Counsel of Record for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Where a person's property is taken in an action for condemnation of which he had no prior notice. is he denied due process of law?

II. Can a claim of res judicata constitutionally bar an assault on a judgment which was void to begin with?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS OF THE STATE OF ARIZONA

The parties to the Arizona state court litigation were the petitioners herein, Del Rio Land, Inc., Western Materials. Inc. and Francis J. Brown dba F. Brown & Sons General Engineering, Inc. as plaintiffs-appellants and City of Phoenix, Arizona Sand & Rock and California Portland Cement Company as defendants-appellees.

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OPINIONS BELOW

The Arizona Superior Court judgment in the case below is attached as Appendix "A". The Arizona Court of Appeals Memorandum Decision in the case below is attached as Appendix "B". The Arizona Court of Appeals decision denying appellants' motion for rehearing is attached as Appendix "C". The Arizona Supreme Court Order denying appellants' petition for review is attached as Appendix "D". The Arizona Superior Court order dismissing the City of Phoenix condemnation case is attached as Appendix "E", and the minute entry order purportedly reinstating that case is attached as Appendix "F". The Arizona Superior Court judgment on mandate in the quiet title case is attached as Appendix "G".

JURISDICTION

Petitioners Del Rio Land, Inc., Western Materials, Inc. and Francis J. Brown, dba F. Brown & Sons General Engineering, Inc. filed this civil action alleging deprivation of procedural due process, abuse of process and trespass on August 29, 1978. The defendants, the City of Phoenix, Arizona Sand & Rock Co. and California Portland Cement Co. filed motions for summary judgment which were granted on September 2, 1980 and on September 16, 1980. Petitioners filed a notice of appeal on October 2, 1980. The Arizona Court of Appeals affirmed on the grounds of res judicata on August 11, 1981. Petitioners filed a motion for rehearing on August 26, 1981 which was denied by the Arizona Court of Appeals on September 22, 1981. A petition for review was filed on October 1, 1981, and was denied by the Arizona Supreme Court on October 20, 1981. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and rules involved are U.S. Const. amendment XIV; Arizona Rules of Civil Procedure 59 and 60. See Appendix H.

STATEMENT OF THE CASE

The City of Phoenix brought condemnation proceedings on July 8, 1971 regarding property that was the subject of a pending quiet title action between the petitioners and others. On July 10, 1974 the condemnation action was dismissed for failure of prosecution. See Appendix E. Subsequently thereto, by some informal telephone arrangements between the assistant city attorney and a secretary-bailiff without action by the judge, the dismissal was set aside and the condemnation action was reinstated on the active calendar. See Appendix F. Notice was apparently sent after the fact to counsel for the petitioners.

The Arizona Rules of Civil Procedure are essentially the same as the Federal Rules. No Rule 59 or 60 motion was filed, with or without notice to the petitioners. No new action was ever filed. This is simply a case in which what amounts to a new action was begun without any process of law whatsoever and without any prior notice. In the new action, the matter lay dormant for several months, then proceeded to judgment on the condemnation. When the petitioners finally won the quiet title lawsuit, they found that they had lost their land by condemnation. In their view of it, no action was ever begun to lead to a condemnation judgment. Petitioners filed two special actions with the Arizona Supreme Court asking to have the condemnation judgment vacated, but the court denied jurisdiction. Arizona Supreme

Court Nos. 12487, 12488.

Prior to the determination in the new condemnation proceedings, the petitioners filed a complaint (C-319348) in the Superior Court, Maricopa County, Arizona on September 5, 1975. Essentially, the plaintiffs alleged that the defendant had conspired to deprive the plaintiffs of their real property without due process of law in a willful, wrongful and intentional manner. On January 5, 1976, the defendants' motion to dismiss was granted because the condemnation action was still proceeding. A notice of appeal was filed, then dismissed for failure to post a bond.

The petitioners also filed an action in the United States District Court for the District of Arizona on September 5, 1975, Cause No. 75-601 PHX-WEC. Petitioners alleged that defendant California Portland Cement Co. had wrongfully taken possession of the petitioners' real property on March 29, 1974, and had converted materials from that property. The petitioners also alleged that St. Paul Fire & Marine Insurance Co. had wrongfully failed to pay all damages arising from the wrongful occupancy of the real property by Portland Cement. This action was dismissed by the district court on January 21, 1976, also on motion alleging in part that the condemnation action was still pending.

On January 5, 1976, the court entered judgment of condemnation for Phoenix. A decree was entered on January 28, 1976. Two years later, the quiet title action concerning the condemned property was decided. On January 25, 1978, the court of appeals entered an order whereby the petitioners' ownership in this parcel of land was finally determined after 9 years of litigation. Judgment was entered on the mandate on June 23, 1978. See Appendix G.

This action was filed on August 29, 1978. Petitioners filed a motion for summary judgment alleging denial of due process since they were not given notice or an opportunity to be heard before the condemnation action dismissal was set aside. The motion was denied; the City of Phoenix filed its own motion for summary judgment which was granted on September 2, 1980. Petitioners appealed, and filed a Rule 60 motion to correct the erroneous reinstatement of the condemnation case which was denied. Their due process argument was raised in their opening brief. In its memorandum decision of August 11, 1981, the Arizona Court of Appeals held that the challenge to the City's taking of the property in the instant case was barred by res judicata because the prior superior court lawsuit alleging deprivation of property without due process had raised the issue of the validity of the condemnation proceedings. The Arizona Court of Appeals also stated that the action filed in the United States District Court had raised the issue of the validity of the condemnation action by implication. The Arizona Court of Appeals held that the dismissals by both the superior court and the United States District Court implicitly recognized the legitimacy of the condemnation proceedings, barring the petitioners from raising the issue in the lawsuit below.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. *A New Action Was Begun Without Any Process of Law.*

We deal with a condemnation action that was dismissed. The illicit erasure of the dismissal without prior notice amounted to in effect the starting of a whole new case and it must be so treated. It is commonplace that there are con-

demnations by the thousands. It is an important public question to determine whether a party in a condemnation proceeding is entitled to notice and the state following all applicable rules at every step of the way.

The basic requirement " 'of due process of law is the opportunity to be heard.' " *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914)). The right to be heard is worth nothing, however, unless a party is informed that the matter is pending so that he can choose to appear or default, agree or contest. 339 U.S. at 314, 70 S. Ct. at 657. Thus, in order to enjoy the right to be heard, parties must first be notified. *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). Moreover, the right to notice and an opportunity to be heard " 'must be granted at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965)). Notice must be reasonably calculated to apprise all interested parties of the pendency of an action so that the parties can raise objections. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14, 98 S. Ct. 1554, 1562, 56 L. Ed. 2d 30 (1978). The due process clause ensures that parties will be informed of proceedings which may directly and adversely affect their legally protected interests. *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 77 S. Ct. 200, 202, 1 L. Ed. 2d 178 (1956); accord *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 786 (5th Cir. 1978).

Notice and the opportunity to be heard must be appropriate to the circumstances and nature of the case. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 29 L. Ed. 2d 113 (1971); *Mullane v. Central Hanover Bank &*

Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). The requisites of the hearing mandated by due process can vary, depending upon the nature of the action. *Id.* Nonetheless, an individual must be given an opportunity for a hearing before he is deprived of any "significant property interests," except when some valid governmental interest is at stake that would justify the postponement of the hearing until after the event. *Boddie v. Connecticut*, 401 U.S. at 379, 91 S. Ct. at 786. Thus, when an individual is deprived of a significant property interest, his opportunity to be heard must occur before the deprivation and in order to be heard the individual must receive prior notice.

In the instant case the petitioners received no prior notice before the ex parte reinstatement of the condemnation action. The Petitioners had a right to be notified in every step of the action before they could be deprived of their real property. Furthermore, the petitioners had the right to expect that the procedural rules would be followed and that the defendants would either file a new action or file a Rule 59 or 60 motion, serving them or sending them copies appropriately. This simply was not done. Fairness is seldom accomplished through a secret, one-sided determination of facts that are decisive of rights. *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). Fairness was not accomplished here. The petitioners were deprived of their property without due process.

II. ***This Matter Is of Further Importance Because the Principles of Res Judicata Require That This Benign Doctrine Not Be Allowed to Paper Over Denial of Procedural Due Process.***

When the judgment of a state court giving the judgment of another court the binding force and effect of res judicata is challenged on the grounds of due process, it is the duty of the Supreme Court to examine the procedure in both lawsuits in order to determine whether the litigant whose rights have been so decided has had such notice and opportunity to be heard as is mandated by the due process clause of the Constitution. *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22 (1940). The principle of res judicata is based on the need for judicial finality and for the need of conservation of judicial resources. *United States v. Texas,* 430 F. Supp. 920, 925, n.6 (S.D. Tex. 1977). These principles, however, give way to the due process requirement that one may not be deprived of his day in court. *Id.* Thus, for example, before res judicata may bar the claim of an absent class number, application of the bar must comport with the due process. *Johnson v. General Motors Corp.,* 598 F.2d 432, 436 (5th Cir. 1979); *Gonzales v. Cassidy,* 474 F.2d 67, 74 (5th Cir. 1973).

To apply res judicata in an action where a party has received no notice, nor had an opportunity to be heard, would offend due process. In this case, the petitioners received no notice that the condemnation matter would be reinstated, nor did they have an opportunity to be heard on that issue. Petitioners' rights to due process were therefore violated. Petitioners' opportunity to raise their due process claims in the subsequent superior court and federal court suits, relied upon by the court of appeals in finding that res judicata bars this suit, was similarly illusory. Those suits were dismissed because the condemnation action had been reinstated and was pending. There was no ruling on the merits that the reinstated condemnation action was legitimate.

The judgment in the condemnation case is void to begin with. The case was reinstated without due process, and without conformity to the rules of procedure. Res judicata cannot constitutionally bar the petitioners from attacking that judgment.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 15th day of January, 1982.

LEWIS AND ROCA

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Counsel of Record for Petitioners

Appendix

Appendix A – In the Superior Court of the State of Arizona, in and for the County of Maricopa

DEL RIO LAND, INC., an Arizona corporation; WESTERN MATERIALS, INC., an Arizona corporation; FRANCIS J. BROWN, dba F. BROWN & SONS GENERAL ENGINEERING, INC., Plaintiff, -vs- CITY OF PHOENIX, a municipal corporation; MARICOPA COUNTY, a body politic; ARIZONA SAND & ROCK, an Arizona corporation; CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation; BLACK CORPORATION, 1 through 25; JOHN DOE and JANE DOE, his wife, 1 through 100; UNKNOWN HEIRS AND ASSIGNS OF JOHN DOE and JANE DOE, his wife, if deceased, 1 through 100, Defendants.	(FILED: September 16, 1980) No. C374196 JUDGMENT

The plaintiff DEL RIO LAND INC.'S Motion for Summary Judgment; the plaintiff WESTERN MATERIALS, INC.'S Motions to Correct Clerical Error, to Vacate Void Judgment and for Summary Judgment; the plaintiff FRANCIS J. BROWN'S Motion for Sanctions, to Strike Insufficient Defenses, to Strike Answer, for Judgment on the Pleadings and for Summary Judgment; the Motion to Dismiss filed by the defendants ARIZONA SAND & ROCK, and CALIFORNIA PORTLAND CEMENT COMPANY; and the defendant CITY OF PHOENIX'S Motion for Summary Judgment having all been

argued to the Court on August 15, 1979; and the Court, after fully reviewing the memoranda, affidavits and exhibits filed in connection with all of the said motions; and the Court having, by minute entry dated June 19, 1980, denied all of the motions filed by the plaintiffs DEL RIO LAND INC., WESTERN MATERIALS, INC. and FRANCIS J. BROWN; and the Court having, by minute entry dated June 19, 1980, granted the Motion to Dismiss filed by the defendants ARIZONA SAND & ROCK and CALIFORNIA PORTLAND CEMENT COMPANY and the Motion for Summary Judgment filed by the defendant CITY OF PHOENIX:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint of the plaintiffs be, and it is hereby dismissed; that the plaintiffs take nothing thereby against the defendants ARIZONA SAND & ROCK, CALIFORNIA PORTLAND CEMENT COMPANY and CITY OF PHOENIX; that the defendants ARIZONA SAND & ROCK, CALIFORNIA PORTLAND CEMENT COMPANY and CITY OF PHOENIX have, and they are hereby granted judgment against the plaintiffs; and that the defendants ARIZONA SAND & ROCK, CALIFORNIA PORTLAND CEMENT COMPANY and CITY OF PHOENIX recover from the plaintiffs their taxable costs herein incurred and expended.

The Court expressly determines that there is no just reason for delay in the entry of the foregoing Judgment and hereby expressly directs that the said Judgment be entered.

DONE IN OPEN COURT this 13th day of August, 1980.

/s/ Frederic W. Heineman
JUDGE OF THE SUPERIOR COURT

Appendix B – In the Court of Appeals, State of Arizona
Division One

DEL RIO LAND, INC., an Arizona corporation; WESTERN MATERIALS, INC., an Arizona corporation; FRANCIS J. BROWN, dba F. BROWN & SONS GENERAL ENGINEERING, INC., Plaintiffs-Appellants. vs. CITY OF PHOENIX, a municipal corporation; ARIZONA SAND & ROCK, an Arizona corporation; CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation, Defendants-Appellees.	(FILED: August 11, 1981) 1 CA-CIV 5679 DEPARTMENT B MEMORANDUM DECISION [Not for publication – Arizona Rules of Civil Appellate Procedure]

Appeal from the Superior Court of Maricopa County
Cause No. C-374196
The Honorable Frederic W. Heineman, Judge
AFFIRMED

[Counsel of Record Deleted].

The principal issue raised by this case is whether the appellants' complaint is barred by *res judicata*.

In 1971 the City of Phoenix filed an eminent domain action, C-250156, to condemn certain real property. The action named several defendants, including Del Rio Land, Inc. (Del Rio), Western Materials, Inc. (Western Materials), and Francis J. Brown. Brown failed to file an answer. Accordingly, a

default judgment was entered against him. The other defendants filed an answer, but trial was delayed for a considerable period of time to allow a related action to come to a conclusion. That related action involved a contest between the defendants named above and others over ownership of the property the City was attempting to condemn.

In 1973 the City requested that the superior court grant it immediate possession of the property. The court granted this request on the condition that the City post a bond of $652,000 pending trial.

The trial court apparently was unaware of the parties' agreement to delay the condemnation pending conclusion of the related action, for on July 12, 1974, it signed an order dismissing the condemnation action for failure to prosecute. Four days later, the trial court issued a minute order setting aside the dismissal and reinstating the action.

In 1975, while the condemnation action was still pending, Del Rio, Western Materials and Brown filed an action (C-319348) against the City of Phoenix, Arizona Sand & Rock and other parties. This action challenged the validity of the condemnation proceedings on the ground that the dismissal of July 12, 1974, had ended the case.

This action was dismissed upon motion of the City of Phoenix. Del Rio, Western Materials and Brown filed a notice of appeal, but the appeal was dismissed for failure to file an appeal bond.

Later in 1975 Del Rio, Western Materials and Brown filed an action in United States District Court apparently also challenging proceedings in the condemnation action on the ground that the July 12, 1974 dismissal had ended the case. This suit was brought against California Portland Cement

Company (Cement Company) and against St. Paul Fire & Marine Ins. Co. (St. Paul). The Cement Company is the parent corporation of Arizona Sand & Rock, which removed material from the property with the permission of the City after the City gained control of the property. St. Paul was the surety on the condemnation bond posted by the City. Upon motion of the defendants, the United States District Court dismissed the action.

The condemnation action came to trial on January 5, 1976, and Del Rio, Western Materials and Brown did not appear. The court subsequently entered judgment in the condemnation action, granting title to the property to the City. Del Rio filed a notice of appeal from the judgment but when Del Rio again failed to provide the necessary appeal bond, the appeal was dismissed.

Del Rio, Western Materials and Brown then brought the present action against the City, Arizona Sand & Rock and the Cement Company. This action, like the previous ones, challenged the validity of proceedings in the condemnation action following the dismissal therein. On the motion of the defendants, the court dismissed the action. Del Rio, Western Materials and Brown appeal.

We have before us not so much a case on appeal as a dead horse awaiting yet another beating. The appellants twice before have raised their objection to losing the property to condemnation (in Maricopa County Superior Court No. C-319348 and in United States District Court Cause No. 75-601-PHX-WEC). They also could have raised this objection in the condemnation action itself. It is not time for this decade-long litigation to end.

The doctrine of *res judicata* was developed to deal with

litigants who will not accept defeat. According to this doctrine, a plaintiff who has had his claim dismissed with prejudice cannot raise again against the same party any of the issues raised in that action. Fraternal Order of Police, Lodge 2 v. Superior Court, 122 Ariz. 563, 596 P.2d 701 (1979); Torres v. Kennecott Copper Corp., 15 Ariz. App. 272, 488 P.2d 477 (1971).

The present challenge to the City's taking of the property is essentially the same as the one in C-349348. Both complaints expressly alleged that the condemnation proceedings after the dismissal were void. The action in United States District Court raised this issue by implication. St. Paul, in its motion to dismiss, argued that the action should be dismissed because of the ongoing condemnation proceedings. Hence, the legitimacy of the condemnation proceedings following the dismissal therein was an implicit issue in the United States District Court action.

The City and Arizona Sand & Rock were prevailing parties in C-319348, and the Cement Company was a prevailing party in the United States District Court case. Both actions ultimately were dismissed with prejudice.

It appears then that all of the essential elements of *res judicata* apply in this case. Appellants argue that *res judicata* does not apply here because (1) the reason for the dismissal in C-319348 had nothing to do with the mertis of their claim; (2) C-319348 was filed before their rights in the property were judicially established, whereas the present action was brought thereafter; and (3) C-319348 challenged proceedings after dismissal whereas the present action challenged the condemnation award itself.

This argument misses the mark. It is immaterial that the

present action and the previous ones are not exactly alike. For *res judicata* to apply, the actions need only be alike in that they raise the same issue. That is the similarity which bars this latest action.

The appellants also argue that *res judicata* is inapplicable because the judgments in C-319348 and the United States District Court action were procured by fraud in that the appellees misled the court about the genuineness of the condemnation action order revoking the dismissal therein.

Western Materials raised the issue of fraud in another context below. Western Materials moved under Rule 60 of the Rules of Civil Procedure for the court to declare void on account of fraud the order revoking the dismissal of the condemnation action. The court rejected this motion on the basis that no factual issue was raised as to the existence of fraud in obtaining the questioned order. Appellants argue, however, that the superior court erred in not granting them a trial on this issue.

Once the appellees moved for summary judgment, with supporting affidavits, the appellants were required to come forward with affidavits based on personal knowledge, supporting their claim of fraud. Rule 56(e), Rules of Civil Procedure. Appellants failed to supply the necessary affidavits. The affidavits filed by them contained either collateral information or information not based on the personal knowledge of the affiant. Hence the trial court properly rejected Western Materials' fraud allegation. Accordingly, we reject appellants' fraud argument concerning the applicability of *res judicata*.

For the foregoing reasons, we hold that the appellants' action is barred by the doctrine of *res judicata*.

Judgment affirmed. 1/

/s/ Eino M. Jacobson
Eino M. Jacobson, Judge

CONCURRING:

/s/ Levi Ray Haire
Levi Ray Haire, Presiding Judge

/s/ Sandra D. O'Connor
Sandra D. O'Connor, Judge

1/ Pursuant to previous orders of this court, the issue of awarding attorney's fees and the amount thereof will abide a determination on the costs of the assessed herein.

Appendix C – In the Court of Appeals, State of Arizona
Division One

DEL RIO LAND, INC., an Arizona corporation; WESTERN MATERIALS, INC., an Arizona corporation; FRANCIS J. BROWN, dba F. BROWN & SONS GENERAL ENGINEERING, INC.,

Plaintiffs-Appellants.

vs.

CITY OF PHOENIX, a municipal corporation; ARIZONA SAND & ROCK, an Arizona corporation; CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation,

Defendants-Appellees.

(FILED: September 22, 1981)

1 CA-CIV 5679
DEPARTMENT B

MARICOPA County Superior Court
No. C-374196

ORDER

Appellants' motion for rehearing and the objections thereto have been considered by the Court.

IT IS ORDERED denying the motion for rehearing.

DATED this 22nd day of September, 1981.

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 22nd day of September, 1981 to:

[Names and Addresses Deleted].

Appendix D – In the Supreme Court State of Arizona

DEL RIO LAND, INC., an Arizona corporation; WESTERN MATERIALS, INC., an Arizona corporation; FRANCIS J. BROWN, dba F. BROWN & SONS GENERAL ENGINEERING, INC.,

Plaintiffs-Appellants,

vs.

CITY OF PHOENIX, a municipal corporation; ARIZONA SAND & ROCK, an Arizona corporation; CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation,

Defendants-Appellees.

(FILED: October 21, 1981)

Supreme Court No. 15671-PR

Court of Appeals No. 1 CA-CIV 5679

Maricopa County No. C-374196

The following action was taken by the Supreme Court of the State of Arizona on October 20, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 21st day of October, 1981.

S. ALAN COOK, Clerk

By /s/ Michael R. Pryor

Deputy Clerk

TO:

[Names and Addresses Deleted].

Appendix E – In the Superior Court of the State of Arizona in and for the County of Maricopa

City of Phoenix
Plaintiff,

Del Rio Land Inc., et al
Defendant.

No. 250156
Judge Marquardt
ORDER OF DISMISSAL

It appearing that this case has been on the inactive calendar for a period of two months or more.

IT IS THEREFORE ORDERED that said case be dismissed without prejudice for lack of prosecution, and

IT IS FURTHER ORDERED that any bond filed herein be exonerated and if said bond be in cash, that same be returned by the Clerk to the proper party or his attorney.

IT IS FURTHER ORDERED that any exhibits herein be returned by the Clerk to the respective parties.

DATE July 10, 1974

PHILIP W. MARQUARDT
Presiding Judge

Attorney for Plaintiff: Attorney for Defendant:

[Names and Addresses Deleted].

Appendix F – In the Superior Court of Maricopa County, State of Arizona

MINUTE ENTRY

22	7-18-74	Hon. Philip Marquardt
Div.	Date	Judge or Commissioner

#250156 City of Phoenix,

vs.

Del Rio Land, Inc.
et. al.,

[Names of Counsel of Record Deleted].

It Is Ordered setting aside dismissal & reinstating this matter on the active calendar as of this date.

Appendix G – In the Court of Appeals, State of Arizona
Division One

PIERRE H. HAUMONT, JR., et ux., Plaintiffs, vs. DEL RIO LAND, INC.; JAMES B. CARR and JANE DOE CARR, his wife, Defendants.	(FILED: June 23, 1978) C219831 JUDGMENT ON MANDATE

On the mandate of the Court of Appeals, Division One, of the State of Arizona; in this Court, dated January 25, 1978 and filed herein on January 26, 1978; wherefrom it appears that the amended judgment of this Court entered herein on June 9, 1975 was reversed and remanded with direction to enter judgment for Defendants, DEL RIO LAND, INC., a corporation; James B. Carr and Jane Doe Carr, his wife, and in obedience to said mandate:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the amended judgment of this Court entered on the 9th day of June 1975 be and the same is hereby vacated and set aside;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that specific performance of the Contract set forth in Plaintiff's Complaint be and the same is denied; and that Plaintiff's Complaint be and the same is hereby dismissed with prejudice.

~~The Court makes an express determination that there is no just reason for delay, and expressly directs the entry of Judgment forthwith.~~

/s/ HP

Done in open Court this 23rd day of June, 1978.

/s/ Howard Peterson
Judge

APPENDIX H

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA RULES OF CIVIL PROCEDURE

Rule 59. New trial; amendment of judgment

59(a) **Procedure; grounds.** A verdict, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting his rights:

1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise which could not have been prevented by ordinary prudence.

. . .

6. Error in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action.

. . .

8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

59(b) **Scope.** A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials are authorized by law or rule of court. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

59(c) **Contents of motion; amendment; rulings reviewable.**

1. The motion for new trial shall be in writing, shall specify generally the grounds upon which the motion is based, and may be amended at any time before it is ruled upon by the court.

2. Upon the general ground that the court erred in admitting or rejecting evidence, the court shall review all rulings during the trial upon objections to evidence.

3. Upon the general ground that the court erred in charging the jury and in refusing instructions requested the court shall review the charge and the rulings refusing an instruction requested.

4. Upon the general ground that the verdict, decision, findings of fact, or judgment is not justified by the evidence, the court shall review the sfficiency of the evidence.

59(d) **Time for motion.** A motion for new trial shall be filed not later than 15 days after entry of the judgment.

. . .

59(f) **Time for serving affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

. . .

59(h) **Questions to be considered in new trial.** A new trial, if granted, shall be only a new trial of the question or questions with respect to which the verdict or decision is found erroneous, if separable. If a new trial is ordered because the damages are excessive or inadequate and granted solely for that reason, the verdict shall be set aside only in respect of the damages, and shall stand in all other respects.

. . .

59(*l*) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be filed not later than 15 days after entry of judgment.

59(m) **Specification of grounds of new trial in order.** No order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted.

Rule 60. Relief from judgment or order

60(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. During pendency of an appeal, such mistakes may be so corrected before

the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

. . .

60(c) **Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

. . . .

Opposition

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No. 81-1341

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DEL RIO LAND, INC., WESTERN MATERIALS, INC., FRANCIS J. BROWN, dba F. BROWN & SONS GENERAL ENGINEERING, INC.,

Petitioners,

v.

CITY OF PHOENIX, ARIZONA SAND AND ROCK AND CALIFORNIA PORTLAND CEMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION I

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257 to review the judgment below where no federal question, substantial or otherwise, was raised below, no federal question was decided in either the trial court or in the Arizona Court of Appeals, and the judgment rests on adequate and independent non-federal grounds?

2. Whether, even if jurisdiction to review otherwise exists, this Court should review a case which satisfies none of the requirements of Rule 17 of the Rules of the United States Supreme Court and otherwise fails to present any non-trivial issue of law.

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*Reference is made to the Rule 28 listing of parents, subsidiaries and affiliates of the corporate respondents filed earlier with their appearance.

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JURISDICTION

Contrary to their assertions, the petitioners did not file a civil action alleging deprivation of procedural due process. Their complaint is reproduced in the Appendix to this brief (A-1) and it is obvious that no federal question was alleged or raised. Furthermore, the motions filed by both the petitioners and the respondents asserted only state law grounds for the judgments sought. The petitioners' motion for new trial mentioned no federal issue. The judgment of the Arizona Superior Court decided no federal issue. The petitioners' opening brief in the Arizona Court of Appeal presented no issue of federal law. Another brief filed by separate counsel for the petitioners below sought to raise a frivolous due process issue but it was not the one sought to be raised by the petition for writ of certiorari in this case. The respondents'

brief below raised only state law issues. The opinion of the Arizona Court of Appeals, reproduced in the Appendix to the petition,[1/] reached and decided no federal issues.

The petitioners' claim that this Court has jurisdiction under 28 U.S.C. § 1254(1) is plain error. If jurisdiction existed at all to review the judgment of a state court, it would exist under 28 U.S.C. § 1257. But since no "title, right, privilege or immunity [was] specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States," this Court has no jurisdiction to review the judgment of the Arizona Court of Appeals.

[1/] The petitioners' reproduction of the opinion below contains a significant error. In the last sentence of the last full paragraph on page B-3, the word "not" should be "now".

We state these jurisdictional facts in this portion of our brief for the convenience of this Court. Our detailed argument as to lack of jurisdiction is made below in the Argument portion of this brief.

STATEMENT OF THE CASE

The petitioners' own Statement of the Case is reason enough to deny the petition. Yet, because it is both incomplete and error-ridden, we state the case ourselves to correct omissions and inaccuracies. We begin by describing a series of separate adjudications which preceded the one which is the subject matter of the petition for writ of certiorari. We then describe the instant case.

I. PRIOR PROCEEDINGS.

A. The Condemnation Action No. C 250156.

On July 8, 1971, Phoenix brought a condemnation action against real property in which all of the petitioners claimed an interest. The petitioners Del Rio Land, Inc., and Western Materials, Inc., filed answers admitting all of the material allegations of the complaint. The petitioner Francis J. Brown, doing business as F. Brown and Sons, General Engineering, Inc., was properly served but failed to answer and a default was entered against him. In July of 1972, the court placed the action on its inactive calendar because of lack of prosecution. In July of 1973, Phoenix filed an application for immediate possession of the real property which was the subject of the condemnation action with notice to the remaining parties to the action, Del Rio Land, and Western Materials. Having defaulted, the

petitioner Francis J. Brown was not entitled to service under Rule 5(a) of the Arizona Rules of Civil Procedure, which, in all material respects, is identical to Rule 5(a), of the Federal Rules of Civil Procedure. The petitioners Del Rio and Western Materials appeared through counsel at the hearing, after which Phoenix was granted possession of the property. On June 18, 1974, the court removed the case from its dismissal calendar. On June 27, 1974, Phoenix filed a motion to set and certificate of readiness. On July 12, 1974, the court erroneously dismissed without prejudice the action for want of prosecution and sent notice to Phoenix and petitioners Del Rio Land and Western Materials. The dismissal was erroneous under Arizona law because the case had been removed from the dismissal calendar, and Phoenix had filed a motion to set the case for trial. Six days later, on July 18, 1974, the court set aside the dismissal and

reinstated the condemnation action on the active calendar. Copies of the order reinstating the action were sent to all counsel, including counsel for Del Rio Land and Western Materials. The court set the case for trial with notice to Del Rio Land and Western Materials. Trial was held in the condemnation action on January 5, 1976. Counsel for Del Rio Land and Western Materials never objected to the restoration of the case to the active calendar because of an agreement he had with Phoenix. Nevertheless, counsel for Del Rio Land and Western Materials had notice of the trial well in advance but failed to appear and attend. The action proceeded and judgment in condemnation was entered. Counsel for Del Rio Land and Western Materials received notice of the judgment. Del Rio Land filed a Notice of Appeal from the condemnation judgment but neither Western Materials nor Francis J. Brown did. The appeal was dismissed for failure to post a bond.

B. Petitioners' State Court Action No. C 319348.

On September 5, 1975, during the pendency of the above described condemnation action, the petitioners filed a separate action against Phoenix, Arizona Sand and Rock, and others asserting the invalidity of the condemnation proceeding on the basis of the alleged improper order reinstating it. Phoenix, Arizona Sand and Rock, and others moved to dismiss, and the petitioners urged the same defects in the condemnation action as they allege here. Judgment entered against the petitioners, who filed notices of appeal. The appeals were dismissed for failure to file a cost bond. Further appellate review was not sought.

C. Petitioners' Federal Action No. 75-601 PHX WEC.

In September of 1975, during the pendency of the condemnation proceeding, the petitioners brought an action against respondent California Portland Cement

Company and the surety on Phoenix's condemnation bond, again challenging the condemnation action on the basis that the July 12, 1974 dismissal had ended the case. Upon motion of the defendants, a judgment of dismissal was entered. No appeal was taken.

II. THE INSTANT ACTION No. C 374196

The complaint of the petitioners against the respondents in the action which is the subject of this petition was filed several years later on August 29, 1978. It is reproduced in Appendix A to this brief. The complaint is inartfully drafted and it is not entirely clear what causes of action were sought to be alleged. What is clear is that each claim is based upon the alleged invalidity of the condemnation decree and nowhere in the complaint is a federal question raised. Petitioners filed motions for summary judgment, but, contrary

to their statement at page 4 of their petition for writ of certiorari, the motions did not argue a denial of due process of law. The petitioner Del Rio's motion is reproduced as Appendix B to this brief in opposition.[2/] The respondents filed their own motions based wholly on state law grounds urging that the petitioners' complaint be dismissed on grounds of res judicata; that the court in the condemnation action had the power to correct its own judgment; and, that the complaint was merely an improper collateral attack on the condemnation judgment.

The Superior Court granted judgment against the petitioners, and decided no federal issue. The petitioners moved for a new trial without mentioning a federal issue.

The petitioners appealed to the Arizona Court of Appeals, but, contrary to

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2/Western Material's and Brown's motions incorporated by reference Del Rio's motion.

their assertion at page 4 of their petition for writ of certiorari, their due process argument was not raised in their opening briefs. Curiously, the petitioners filed two opening briefs in the Arizona Court of Appeals. That portion of one of the petitioners' briefs which contains its "statement of issues presented" is reproduced in Appendix C to this brief. The Court will note that no federal issue was presented. Another brief filed on behalf of the petitioners (this was a strange case) did purport to raise a due process issue, but not the one sought to be raised by this petition for writ of certiorari. The issues presented by the petitioners for review in their second brief are reproduced in Appendix D. Issue number one there stated, to the extent that it is comprehensible at all, is not the issue sought to be raised in this petition for writ of certiorari. In any event, all that appeared in this second brief on this purported issue is reproduced in Appendix E

to this brief. The Court will note that the discussion is frivolous and, in any event, not directed to the issue sought to be raised by this petition for writ of certiorari. In short, no non-frivolous federal issue was presented to the Arizona Court of Appeals and no federal issue was raised in the trial court.

The Arizona Court of Appeals affirmed the trial court's judgment on the basis of res judicata and reached no federal question. This is so because before the petition for writ of certiorari was filed, this was not a federal case.

SUMMARY OF ARGUMENT

Because a federal question is neither raised by the record below nor decided by the Arizona Court of Appeals, this Court is without jurisdiction to review this case under 28 U.S.C. § 1257(3). Jurisdiction is also lacking because the judgment below rests on adequate and independent

non-federal grounds. Thus this Court would never reach the petitioners' questions presented for review.

Neither of the questions presented for review by the petition are to be found in this case. Because the petitioners' property was taken with adequate notice, the factual predicate for the questions presented does not exist.

Even if jurisdiction exists to review the questions presented, this is hardly a certworthy case. The Arizona Court of Appeals decided no federal question and there are no special and important reasons for granting the writ. None of the factors in this Court's Rule 17 are present.

Even if we assume that the facts are not as they really are, but as the petitioners would have them, their claim that the order below was somehow violative of due process is foreclosed by prior decisions of this and other courts, the

harmless error doctrine, and the unique facts of this case.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE IS NO JURISDICTION UNDER 28 U.S.C. § 1257 TO REVIEW THE JUDGMENT BELOW.

Since the petition seeks review of a state court judgment, jurisdiction, if it exists, would arise under 28 U.S.C. § 1257. Since the validity of neither a state nor a federal statute was drawn into question below, jurisdiction would exist only if "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. § 1257(3). But neither the record nor the decision below raise any such federal question. The questions presented for review by the petition are: (1) "Where a person's property is taken in an action for condemnation of which he had

no prior notice, is he denied due process of law?" and, (2) "Can a claim of res judicata constitutionally bar an assault on a judgment which was void to begin with?".

But the Arizona Court of Appeals did not decide these questions in this proceeding. Moreover, the factual record will not support a determination of these questions by this Court.

A. The Final Judgment Fails to Reflect a Substantial Federal Question That Has Been Properly Raised and Necessarily Decided in The State Court Proceeding.

It goes without saying that jurisdiction to review the decision of a state court on certiorari requires that a final judgment reflect a substantial federal question that has been properly raised and necessarily decided by the state court. But nowhere in the Memorandum Decision of the Arizona Court of Appeals (Appendix B to the petition) are the federal questions sought to be presented

for review raised or decided. The Memorandum Decision speaks for itself. The court held "that the appellants' action is barred by the doctrine of res judicata." (Appendix B-5 to the petition). Thus the questions which petitioners put to this Court cannot be extracted from the opinion below.

This is not surprising since the issues sought to be presented to this Court were neither raised nor decided on the record below. We refer this Court to the petitioners' complaint below. (Appendix A to this brief). Nowhere are these questions presented. We refer the Court to the petitioners' motion for summary judgment below. (Appendix B to this brief). Nowhere are these questions presented. The questions were not presented in the petitioners' motion for new trial, and the judgment below decided no federal issue, let alone the issues presented for review. One of the petitioners' opening briefs in the

Arizona Court of Appeals failed to list any federal issue. (Appendix C to this brief). The other brief listed one which was insufficiently argued below to be considered by the Arizona Court of Appeals and, in any event, was not the same issue that is sought to be presented to this Court. (Appendix D, E to this brief).

It is essential to the jurisdiction of this Court under § 1257 that a substantial federal question be properly raised in the state court proceeding. It must not be so devoid of merit as to be frivolous. It was the duty of the petitioners to bring any federal question before the courts below with some reasonable level of precision. This they failed to do. This Court has held insufficient mere references to the "Constitution of the United States" or "due process of law". Herndon v. Georgia, 295 U.S. 441, 442-43, 55 S.Ct. 794, 795 (1935); Bove v. Scott, 233 U.S. 658, 664-65, 34 S.Ct. 769, 771 (1914).

The record in this case is so devoid of a federal issue that the Arizona Court of Appeals failed to even pass upon one. Under these circumstances, the petitioners have the burden of showing that they properly raised the question and this they have failed to do. Since the federal constitutional issue was not raised in the trial court, as required by Arizona law, the Arizona Court of Appeals had no duty to decide the issue and this alone would preclude review on certiorari by this Court. Michigan v. Tyler, 436 U.S. 449, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7 (1978). It is not surprising that in this case the petitioners have failed to seek a certificate from the Arizona Court of Appeals to the effect that their federal questions were raised and decided.

B. The Judgment Below Rested On Adequate And Independent Non-Federal Grounds.

There was no substantial federal question raised in this case, but even if

there were, there were adequate and independent state grounds to support the judgment. Thus this Court has no jurisdiction. It is clear in this case that the state court judgment was based upon non-federal grounds and that the non-federal grounds were adequate to support it. The Memorandum Decision of the Arizona Court of Appeals is clearly based upon its holding that the "appellants' action is barred by the doctrine of res judicata". (Appendix B-5 to the petition).

This brings us to the petitioners' "reasons for granting the writ". They say that a new action was begun without any process of law, and then proceed to refer to boiler plate due process cases in support of the proposition that they were deprived of property without due process. We will turn to the merits below, but note here that the petitioners' reasons entirely ignore the record and the adequate and

independent state grounds for the decision.

It is undisputed that the petitioners were properly served in the condemnation action. It is undisputed that the petitioner Brown defaulted. It is undisputed that petitioners had notice of the reinstatement of the action and the setting of the case for trial. It is undisputed that judgment entered against the petitioners Del Rio and Western Materials with notice. It is undisputed that they filed a notice of appeal from that judgment but failed to perfect it. It is plain that if the petitioners seriously thought that the reinstatement of the condemnation action by the court below deprived them of due process, they could, and should, have appealed from the judgment entered against them. It is absolutely clear that they had notice of the action, notice of the trial date, and notice of the judgment. Instead, they chose to consciously disregard the action and at the

same time bring separate frivolous actions against the respondents. They attempted to collaterally attack the condemnation action in their separate actions in state and federal court and these actions too were dismissed. Yet they failed to perfect appeals from either of these separate actions, although a notice of appeal from the state court judgment was filed. Instead, despite these prior actions, they brought the instant action to collaterally attack the judgment entered in the condemnation action for a third time. It is undisputed that the judgment entered in the condemnation action was a final judgment by a court of competent jurisdiction over the subject matter and the parties which precludes the relitigation of any issues raised or of any issues which could have been raised but were not. Similarly, the separate state and federal court actions sought to collaterally attack the condemnation

proceeding. These actions were dismissed with prejudice and no appeals were perfected. Under the doctrine of res judicata, as it exists in Arizona, and in the federal system, these petitioners are now precluded from relitigating the validity of the condemnation proceeding.

The application of the doctrine of res judicata to bar the present action was so obvious that the Arizona Court of Appeals did not even reach the other adequate and independent state grounds which would have permitted it to affirm the judgment below. We argued below that it was proper under the Arizona Rules of Civil Procedure to set aside the order of dismissal to correct error and reinstate the case on the active calendar. We argued that the petitioners' claims were barred by laches and estoppel. We argued that the petitioners' complaint was an illicit collateral attack on the judgment entered in the condemnation action. Any one of

these grounds would have supported the affirmance of the trial court judgment on adequate and independent state bases.

The petitioners' claim that they were deprived of their property without due process in the condemnation action is simply unsupported by the record. They had notice of the action, the trial, and the judgment. They simply failed to do anything other than file a notice of appeal which they did not perfect. Thus the fact that they had no notice, before its entry, of an order reinstating the case on the active calendar is of no consequence. They had notice of the order itself. Once the action was reinstated, they continued to have the notice to which they were entitled. Thus the petitioners' question presented is based upon an erroneous understanding of the facts. Their property was not taken without prior notice.

Similarly, since there was no deprivation of due process, res judicata

was properly applied as a bar to the instant action and therefore the state ground for the decision below was quite adequate. We touch the merits here only to support the adequacy of the independent state ground for the decision and address the merits at greater length below.

II. EVEN IF JURISDICTION OTHERWISE EXISTED, THIS IS NOT A CERTWORTHY CASE.

We are satisfied that this Court is without jurisdiction to review the decision below because no substantial federal question was properly raised and decided below, and there were adequate and independent state grounds for the decision. But even if we are wrong, this is hardly a certworthy case. There are no special and important reasons for granting the writ. For example, none of the reasons stated in this Court's Rule 17 apply here. The state court of last resort decided no federal question at all, let alone one in conflict with the decision of another state

court or federal court of appeals. Rule 17(1)(b). Nor has the state court decided an important question of federal law which has not been but should be settled by this Court. Rule 17(1)(c). Nor has the state court decided a federal question in a way in conflict with the applicable decisions of this Court. Rule 17(1)(c).

The decision below turned upon its own facts. It will have an effect on no one other than the litigants. Indeed, the Arizona Court of Appeals considered the result so obvious that it did not deem the case important enough to publish its decision. See generally, Rule 28(b), Arizona Rules of Civil Appellate Procedure. Thus its decision is not to be regarded as precedent or even cited by any court under the doctrine of stare decisis. Rule 28(c), Arizona Rules of Civil Appellate Procedure. And, as pointed out above, there were other meritorious arguments in support of the decision below

without regard for any of the questions sought to be raised by the petition. Thus this Court would never reach federal questions.

Let us now look at the petitioners' "reasons for granting the writ". Nowhere in the petition are Rule 17's considerations governing review on certiorari even mentioned. They simply do not apply. The petitioners state that they received no prior notice before the reinstatement of the condemnation action. This is irrelevant to the questions they seek to present. They were properly served in the action and certainly had notice of the order reinstating it. Additionally they had notice of the order setting the case for trial, notice of the judgment itself, and they simply failed to perfect an appeal, although notice of appeal was filed. Thus, to the extent that the petitioners lost the condemnation action, it certainly was not the result of their

failure to receive any prior notice of any intermediate order of the court. That the issue the petitioners raise is trivial is proven by their failure to cite to this Court a single case from any jurisdiction suggesting that pre-order notice rather than post-order notice violates due process. Our own independent research has revealed none. Consider, for example, what would have happened had the court given the parties notice before it reinstated the case. Assume also that the court would have reinstated the case after hearing. What then would have been the petitioners' remedy. Obviously they would have had to have participated in the trial of the matter and, if aggrieved by the judgment, appeal. They had this same opportunity in the condemnation action after its reinstatement because they had notice of its reinstatement. They simply failed to proceed. Their property was condemned, not because of lack of notice, but because they

failed to participate in a case in which they had notice. Thus their due process argument is frivolous.

The petitioners next argue that the matter is important because of the interplay between res judicata and due process of law. They claim that res judicata must yield so that a party is not deprived of his day in court. Whatever merit this may have in some other case, it is irrelevant here. The petitioners had their day in court in the condemnation action. They had notice of the action. They had notice, after entry, of the order complained of, and they ignored it. They had notice of the trial and ignored it. They had notice of the judgment and even filed a notice of appeal, but failed to perfect the appeal. Thus, the petitioners were not deprived of their day in court because of the court's reinstatement of the action but because of their own voluntary conduct. Their due process argument

against the background of *res judicata* simply vanishes. Thus this case affords this Court no opportunity whatever to explore the questions presented.

III. IN ANY EVENT, THE DECISION BELOW IS CORRECT ON THE MERITS.

Not only is there no jurisdiction to review the decision below and not only does this case fail to be certworthy, but the decision below is correct on the merits.

Let us assume that the facts are not as they really are but as the petitioners would have them. Assume, somehow, that their questions are properly presented by this case. The question, at bottom, appears to be: can a court reinstate a dismissed case with notice after, but not before, entry of its order, consistent with the demands of procedural due process? We submit that it can.

A. Link v. Wabash R. R. Co. is Dispositive.

That such action might constitute a denial of due process is foreclosed by Link v. Wabash R. R. Co., 370 U.S. 626, 82 S.Ct. 1386 (1962). This Court upheld the sua sponte dismissal with prejudice of a negligence action for lack of prosecution. This Court stated:

> The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. 370 U.S. at 630-631.

The Court held that the absence of notice and hearing prior to dismissal did not constitute a denial of due process. This Court stated:

> Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such

> notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." Anderson National Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. 370 U.S. at 632.

Here the petitioners had knowledge of the "consequences of [their] own conduct."

Link involved a dismissal with prejudice of an action, a very drastic sanction. Therefore, it cannot be doubted that a court can take the much less drastic step of vacating a dismissal without prejudice, sua sponte and without notice to the adverse party. Numerous state court decisions uphold the power of a trial court, on its own motion without notice, to vacate a dismissal without prejudice for

lack of prosecution without even discussing the possibility of a due process problem. See Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969); Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So.2d 399 (Miss. 1966); Ford v. Eskridge, 186 S.E. 204 (Ga. App. 1936); Turman v. Turman, 40 S.W.2d 447 (Tex. Civ. App. 1932); Parnell v. Barron, 261 S.W. 529 (Tex. Civ. App. 1924); Athens Apartment Corp. v. Hill, 119 S.E. 631 (Ga. 1923); Mitter v. Black Diamond Coal Co., 28 Wyo. 439, 206 P. 152 (1922).

B. Any Lack Of Notice To Petitioners Prior To The Reinstatement Of The Condemnation Action Was Harmless Error.

Rule 61 of the Arizona and Federal Rules of Civil Procedure provides as follows:

> No error . . . in anything done or omitted by the court . . . is ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent

> with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Petitioners concede that the dismissal for lack of prosecution was without prejudice; and that, therefore, a new condemnation action might have been brought. Moreover, petitioners have suggested nothing which might have barred the filing of a new condemnation action. Reduced to its essentials, petitioners' complaint is that the trial court, instead of requiring respondent to file a new condemnation action, reinstated the first condemnation action without prior notice to petitioners. Petitioners concede that they were given notice after the reinstatement, before any other proceedings in the condemnation action. Any error in not giving such prior notice to the petitioners is clearly harmless. If the condemnation action had not been reinstated, and Phoenix

had filed a new action, as petitioners suggest, petitioners would not have received notice of this conduct until after the suit had been filed, before any other proceedings in the action. That was, in substance, the notice given to petitioners here. The failure to give petitioners any additional notice clearly did not affect any "substantial rights" of the petitioners; therefore, they have no claim to relief.

C. There Has Been No Deprivation Of A "Significant Property Interest" Without Due Process Of Law.

Finally, even if it is assumed arguendo that the petitioners were entitled to notice prior to the trial court's reinstatement of the condemnation action, the failure to give such notice did not constitute a denial of due process.

Petitioners rely on this Court's decisions to establish several basic propositions, e.g., that the basic

requirement of due process is the opportunity to be heard, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950); that in order to enjoy the right to be heard, parties must first be notified, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972); that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner, Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965); that parties must be informed of proceedings which may directly and adversely affect their legally protected interests, Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956); and that parties must be given an opportunity for a hearing before they are deprived of any "significant property interests", Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971).

Conceding the validity of these general propositions, petitioners have failed to establish that they have been

denied due process of law. Petitioners were not deprived of any "significant property interests" without notice and an opportunity to be heard; they concede that they received notice of the reinstatement of the condemnation case before there were any further proceedings in the action in which their property was condemned. There is no dispute that Phoenix simply could have filed a new condemnation action, giving notice to petitioners of such conduct only after the fact. Therefore, it is frivolous to suggest that petitioners were denied due process of law when, in substance, the same result was accomplished in a different manner. At no time were petitioners deprived of a "significant property interest" or a "legally protected interest" without prior notice and an opportunity to be heard. It is ludicrous for petitioners here to claim that they were denied notice and an opportunity to be heard in the condemnation action. After

receiving notice of the reinstatement of the condemnation action, they failed to make any further appearances in the action, thereby foregoing their opportunity to be heard and allowing judgment to be entered against them. And then, after judgment had been entered, they filed a notice of appeal from it -- and thus they still had a right to contest the validity of the order reinstating the case -- but failed to perfect the appeal, causing its dismissal.

In short, petitioners received notice of the reinstatement of the condemnation action prior to any further proceedings in the action, at a "meaningful time", giving them an opportunity to be heard before their property was condemned and thereafter to appeal from the judgment of condemnation. Since they received the process due them, this case affords this Court no opportunity to reach the questions presented.

CONCLUSION

For all these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 16th day of February, 1982.

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Appendix

APPENDIX

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APPENDIX A

Petitioners' Complaint

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEL RIO LAND, INC., an Arizona Corporation; WESTERN MATERIALS, INC., an Arizona Corporation; FRANCIS J. BROWN, dba, F. BROWN & SONS GENERAL ENGINEERING, INC.,	)
Plaintiffs,	)NO. C37419
vs.	)COMPLAINT)(CIVIL NON
CITY OF PHOENIX, A Municipal Corporation; MARICOPA COUNTY, A Body Politic; ARIZONA SAND & ROCK, an Arizona Corporation; CALIFORNIA PORTLAND CEMENT COMPANY, A California Corporation; BLACK CORPORATION, 1 through 25; JOHN DOE and JANE DOE, his wife, 1 through 100; UNKNOWN HEIRS AND ASSIGNS OF JOHN DOE and JANE DOE, his wife, if deceased, 1 through 100,	) CLASSIFIE
Defendants.	)

FIRST CAUSE OF ACTION

I.

General Jurisdictional Allegations:

That the real property the subject of this action is situate in Phoenix, Maricopa County, Arizona; and was acquired by James B. Carr, Elizabeth Carr, Frank P. Carr, James B. Carr, Jr., Thomas A. Carr, Jess J. Carr; John K. Carr; Christopher Carr; Paul E. Carr; Mary M. Carr; Crispus J. Carr; all members of the Carr Family who worked and operated the property as a family enterprise until the year 1964, when two corporations to wit, Del Rio Land, Inc. and Western Materials, Inc. were organized to operate said property and enterprise; each of said members having assigned, set over and transferred their interest to Del Rio.

Plaintiffs, Del Rio Land, Inc. and Western Materials, Inc. are corporations organized and existing under and pursuant

to the laws of the State of Arizona, with their respective principal places of business in Maricopa County, Arizona; that Francis J. Brown is a resident of Maricopa County; doing business under the name and style of F. Brown & Sons, General Engineering, Inc., a sole proprietorship; and he is the successor in interest to all of the rights, privileges, and immunities of F. Brown and Sons, General Engineering, Inc. an Arizona Corporation.

Defendant, City of Phoenix, at all times herein pertinent was and now is a municipal corporation duly organized and existing under and by virtue of the Laws of the State of Arizona; Maricopa County is a Politic of the State of Arizona; California Portland Cement Company, a California Corporation and its agent and wholly owned and controlled subsidiary Arizona Sand and Rock is a corporation organized and

existing under and pursuant to the laws of the State of Arizona, with its principal place of business in Maricopa County, Arizona; Defendants, BLACK CORPORATION 1 through 25; JOHN DOE and JANE DOE, his wife, 1 through 100 (if deceased), are joined herein in fictitious names, the true names of each of said fictitious party, or parties, being presently unknown to Plaintiffs; leave of Court is hereby requested to interlineate the true name and identity of each such fictitious party or parties when the same becomes ascertained; that it is necessary for a complete determination of this action that the unknown heir or heirs of any deceased person be made parties hereto; and the unknown heirs of such deceased person, if any, are hereby sued as such unknown heirs.

That each and all of said defendants have caused one or more acts or events to

occur out of which Plaintiffs' Causes of Action accrued within Maricopa County, Arizona, as hereinafter alleged:

II.

Heretofore, and on or about July 8th, 1971, the City of Phoenix purporting to act under and pursuant to the provisions of Title 12, Chapter 8, Article 2, Arizona Revised Statutes, commenced an action against Plaintiffs and each of them; being Cause No. C-250156 in this Court seeking to condemn certain real property, among others more particularly described as follows:

> The South half of the Northeast quarter of Section 21, Township 1 North, Range 3 East, G&SRB&M;
> EXCEPT the South 600 feet of the East 660 Feet thereof, and
> EXCEPT any part lying within the following described property;
> BEGINNING at a point 33 feet West of a point 400 feet North of the Southeast corner of the Northeast quarter of Section 21, Township 1 North, Range 3 East; thence on a Northerly direction in a line parallel to the Eastern boundary of said Section and 33 feet West of

the said Section line to a point 132 feet North of the place of beginning; thence in a Westerly direction 660 feet to a point 532 feet North of the Southern boundary line of said Northeast quarter; thence Southward along said line a distance of 132 feet; thence in an Easterly direction, to point of beginning. (77.292 acres).

Including the leasehold interests of Western Materials, Inc. as the holder of a valid lease upon the above premises; Memorandum of which was dated July 16, 1965, recorded July 19, 1965; in Docket 5640, p. 212; and Francis J. Brown, dba, F. Brown & Sons General Engineering; as successor in interest of that certain lease subject of "Memorandum Agreement" dated July 16, 1965 in Docket 5640, page 212; that on July 9, 1971, City of Phoenix recorded a Notice of Lis Pendens against the said property above described in Docket 8809, Page 657, Records of the County Recorder, Maricopa County, Arizona.

III.

The City of Phoenix under the verification of its then Mayor, John Driggs, alleged in said Cause C-250156, that a dispute existed as to the claims of ownership to the real property described in Paragraph II hereof between Plaintiffs, Del Rio Land, Inc., Western Materials, Inc., and F. Brown & Sons General Engineering, Inc., and Pierre H. Haumont, Jr. and Vernice Haumont, his wife, which was the subject matter of the litigation between said parties in Cause No. C-219831 then pending in this Court. Plaintiffs, Del Rio Land, Inc., et al, alleges that said litigation was and has now been resolved in their favor and adverse to all the claims of Pierre H. Haumont, et ux, under and pursuant to a Judgment on Mandate entered the 23rd day of June 1978; recorded on said date in Docket 12986, page 752-753,

in the Office of the County Recorder, Maricopa County Arizona; by reason of which the said Pierre H. Haumont, Jr., et ux, are not now joined as parties hereto under Rule 19(a) RCP, as they have no interest at all in the subject real property; that the Causes of Action herein sued upon by Plaintiffs accrued on June 23, 1978.

IV.

That pursuant to Rule 16(d) Uniform Rules of Superior Court of Maricopa County (17 ARS), on the 8th day of July, 1971, Cause C-250156 was permanently assigned to the Honorable Philip W. Marquardt, Division No. 22; that pursuant to Rule 4(d) Uniform Rules of Practice of Maricopa County on the 18th day of July 1972, an Order of Court was entered placing said Cause C-250156 on the inactive calendar for dismissal on September 15, 1972, unless a certificate of readiness be filed; no

certificate of readiness having been filed, the Court thereafter on January 18, 1974, Judge Marquardt presiding, entered a Minute Order dismissing Cause C-250156, and on July 10, 1974, Judge Marquardt signed the formal written "ORDER OF DISMISSAL" of Cause No. C-250156; the same was entered into the official Court Records on July 12, 1974, thereby judicially terminating said Action; an exact copy of said "Order of Dismissal" is attached hereto as Exhibit "A" to which reference is made herein for all purposes. No appeal was taken from said "Order of Dismissal"; said "Order of Dismissal" is now final and conclusive and Cause No. C-250156 stands dismissed.

V.

That on July 18, 1974, the City of Phoenix acting by and through an Assistant City Attorney, unlawfully caused the

following text to be inserted into the Minutes of the Clerk of Division 22 of said Court in said Cause No. C-250156, to wit:

"It is ordered setting aside dismissal and reinstating this matter on the Active Calendar as of this date."

That this spurious minute order was not and is not the result of a judicial act of Judge Philip Marquardt to whom the case had been premanently assigned as aforesaid; nor was the said "Order of Dismissal" the subject of any written stipulation, or of any oral stipulation made in open Court and entered into the minutes of the Clerk of Division 22; but the said purported Minute Order was in fact dictated over the telephone by the said Assistant City Attorney for the City of Phoenix who, in the absence of Judge Marquardt, and without the knowledge or consent of said Judge, instructed the Secretary-Bailiff of Divi-

sion 22, to cause the Deputy Clerk of said Court to insert the above text in the minutes of the Court on said date. That said purported "Minute Order" was not made in complaince with any of the Rules of Civil Procedure; or of the Uniform Rules of Practice of the Superior Court; or of the Maricopa County Local Rules of Practice, as adopted, promulgated and approved by the Supreme Court of the State of Arizona; or of any applicable statute of the State of Arizona, governing such proceeding. That purported "Minute Order" was not supported by any motion, oral or written, but was inserted as aforesaid, without Notice to Judge Marquardt; and was likewise without any notice to plaintiffs herein; that Plaintiffs did not and have not since waived their rights to notice of any proceeding to vacate said "order of Dismissal", nor have they ratified or consented

to, the aforesaid spurious and purported "Minute Order" was and is unlawful, null, void and of no force and effect; that after July 10, 1974, none of the Plaintiffs herein, took any action; and did not appear in Cause No. C-250156, by counsel or in person.

VI.

Thereafter, and notwithstanding that under any by reason of the formal written "Order of Dismissal" signed by Judge Marquardt and dated July 10, 1974; and entered in the records on July 12, 1974, there by terminating said Cause No. C-250156, the City of Phoenix, acting by and through its agents, servants and attorneys, in concert with others, knowingly, unlawfully and wilfully carried on and conducted further proceedings under the aforesaid captioned Cause Number C-250156, thereby resulting in the purported rendition of the following, to wit:

1. "Judgment in Condemnation" dated January 23, 1976; entered January 26, 1976; condemning the real property described in Paragraph II hereof, of Plaintiff, Del Rio Land, Inc., and the interests of Western Materials, Inc.; and Francis J. Brown therein;

2. "Final Decree in Condemnation" dated and entered on January 28, 1976, vesting title to and right to possession of said real property in and to City of Phoenix; in fee simple absolute, free and clear of all and any estates, rights, claims, liens and encumbrances;

3. "Judgment Disbursing Money," dated and entered on February 2, 1976; directing payment of funds in accordance with the erroneous judgment in Colsolidated [Sic] Causes C-219831 and C-233593 dated June 9, 1975; which said judgment was vacated and set aside pursuant to Judgment on Mandate

entered on June 23, 1978, as aforesaid;

4. "Amended Final Decree in Condemnation" dated and entered September 8, 1976, correcting the legal description of the real property condemned and vesting title in fee simple in and to City of Phoenix;

5. "Amended Judgment in Condemnation" dated and entered on September 8, 1976, correcting legal description in judgment dated January 23, 1976;

each and every, all and singular of which acts, conduct and proceedings, were and are null and void, and of no legal force and effect whatsoever, having been so made and entered without jurisdiction so to do.

WHEREFORE Plaintiffs Del Rio Land, Inc., Western Materials, Inc., and Francis J. Brown, prays judgment against City of Phoenix, as follows:

1. That the Court forthwith issue an Order to show cause herein directed to the

Defendant, City of Phoenix, ordering said Defendant to be and appear and show cause before this Court why the Orders, Judgments and Decrees set forth in the next successive paragraphs should not be judicially vacated, set aside and held for naught;

2. That each and all of the following judgments entered in Cause No. C-250156, to-wit: "Judgment in Condemnation: dated January 23, 1976 entered January 26, 1976; "Final Decree in Condemnation" dated and entered January 28, 1976; "Judgment Disbursing Money" dated and entered February 2, 1976; "Amended Final Decree in Condemnation" dated and entered September 8, 1976; "Amended Judgment in Condemnation" dated and entered September 8, 1976, each be declared null and void and the same be vacated, set aside and held for naught;

3. That Defendant, City of Phoenix, be ordered and directed to execute and deliver a release of that certain Notice of Lis Pendens recorded against the property of Plaintiffs hereinabove described and recorded July 9, 1971 in Docket 8809, Page 657; Records Maricopa County, Arizona.

4. For Judgment against Defendant City of Phoenix for reasonable attorney's fee for its failure and wilful refusal to release said Lis Pendens under and pursuant to §12-1191 ARS;

5. For Plaintiffs' costs herein incurred and expended and for such other and further relief as may be proper in the premises.

SECOND CAUSE OF ACTION

For their further and separate cause of action Plaintiffs and each of them allege:

VII

In the interest of brevity Plaintiffs re-allege each and every, all and singular the allegations of First Cause of Action, and by this reference make the same a part hereof for all purposes.

VIII

Plaintiffs and each of them are informed and believe that one or more of the Defendants named and set forth in the General Jurisdictional Allegations hereinabove set forth claim or asserts an interest in the parcel of real property described in Paragraph II of First Cause of Action, adverse to Plaintiffs and each of said Defendants purported and fradulent claims are without any right whatsoever and that each and every said Defendant has no right, title, estate, lien or interest whatsoever in said real property or any part thereof.

IX

Plaintiff, Del Rio Land, Inc., more than 20 days prior to the commencement of this Action, requested City of Phoenix to execute a quit claim deed to the real property hereinabove described, and tendered said quit claim deed together with the sum of Five and 00/100 ($5.00) to Mayor Hance of City of Phoenix for execution and delivery of said deed; that the City of Phoenix refuses to comply with said request by reason of which said Plaintiff demands the Court to allow a reasonable attorney's fee for the prosecution of this Action in addition to Court costs herein incurred, pursuant to Section 12-1103B, (amended) ARS.

WHEREFORE Plaintiffs pray judgment:

1. That the Defendants and each and every one of them be forever barred from all claim to any estate or interest

in the subject real property described in Paragraph II, of First Cause of Action, referred to in this Complaint.

2. That it be adjudged and decreed that Plaintiff, Del Rio Land, Inc. a corporation, is the lawful owner of and is vested with absolute title in fee simple to the real property described in Paragraph II of First Cause of Action.

3. That Plaintiff, Del Rio Land, Inc., be awarded the sole and complete possession of the subject real property, subject only to the rights and interests of Western Materials, Inc., a Corporation, and Francis J. Brown, dba F. Brown & Sons, General Engineering, Inc., as set forth in Memorandum of Leases dated and recorded July 16, 1965, recorded in Docket 5640 pages 211 and 212, respectively.

4. That Plaintiff, Del Rio Land, Inc., have and recover reasonable attorneys'

fees as provided by Section 12-1103B ARS; and for its costs herein incurred and expended; and for such other and further relief as may be just and proper in the premises.

THIRD CAUSE OF ACTION

For their separate and additional cause of action against Defendants, Plaintiffs allege:

X.

In the interest of brevity Plaintiffs re-allege each and every, all and singular the allegations of First and Second Causes of Action hereinabove set forth and by this reference make the same a part hereof for all purposes.

XI.

Plaintiffs are ignorant of the true names, identities and capacities of all the Defendants sued herein as Black Corporation, 1 through 25; John Doe and

Jane Doe, his wife, their heirs and assigns, 1 through 100; and therefore sues these Defendants by such fictitious names. Plaintiffs request leave of Court to amend this Complaint to allege their true names, identities and capacities when ascertained. Plaintiffs are informed and believe and therefore allege that each of the fictitiously named defendants were and are responsible for; or in some manner have caused or contributed to, the occurrences hereinafter alleged and that the Plaintiffs' injuries, loss and damages were proximately caused thereby.

XII.

That for a long period of time prior to July 8, 1971, and continuing thereafter from time to time up to the filing of this Complaint, Defendant, City of Phoenix, acting by and through its agents, servants, employees, officers and attorneys knowingly,

unlawfully and, wilfully combined and conspired with one or more of said fictitiously named defendants in addition to the Defendant, California Portland Cement Company and its agent, Arizona Sand & Rock; and agreed to among other things, and did expropriate the real property of Del Rio Land, Inc. hereinabove described for unlawful and private purposes; and thereby interfered with and destroyed the rights, interests and privileges of Plaintiffs and each of them, therein;

That in so doing, said Defendants have been guilty of continuous trespass and have illegally caused or permitted the following acts to occur:

1. Destruction of the truck shop located upon the subject real property;

2. Burning and destruction of the small house located upon the premises;

3. Destruction and removal of water service lines located on premises;

4. Destruction of the water well located on the premises;

5. Caused or directed the removal of the utility power poles located upon the premises;

6. Destruction and removal of the barbed wire fence which protected and bordered the south boundary of the subject premises;

7. Placed a sanitary storm drain across the subject real property effectively cutting the property in half and preventing the maximum effective use of the property as one unit.

8. Prevented the mining of three million (3,000,000) tons of sand and gravel by constructing the sanitary storm drain in the mineral deposit contained upon the real property.

9. Prevented the use of the approximately 4 million (4,000,000) cubic yards of excavated space to be utilized as and for re-cycling and reclamation facility and as a sanitary landfill.

10. Contaminated six hundred and fifty thousand (650,000) tons of valuable non-plastic silt located on the subject real property.

11. Unlawfully mined and removed approximately six million (6,000,000) tons of valuable sand and gravel material from the subject real property.

12. Caused subject real property to be converted into a foul and stinking garbage dump for putrid materials which the City allows and permits to be transported and dumped upon and into the excavated areas of said premises thereby effectually preventing future mining, processing and recovery of

approximately 18,000,000 million tons of valuable sand and gravel.

13. Destroyed the right to ingress and egress of the subject real property to South 12th Street.

14. Prevented Plaintiffs use and occupancy of the surface area (not being mined) with consequent loss of rents, fees and revenue therefrom.

15. Prevented Plaintiffs from using the excavation created by the mining of the sand and gravel as a depository and site for a salvage yard and reclamation and recycling operation and as a viable sanitary land fill.

16. Unlawfully mined and removed approximately one hundred and fifty thousand tons of silt from the real property.

17. The City of Phoenix acting through its agents and employees knowingly

and illegally suffered and permitted the Defendant, Arizona Sand and Rock, by and through its agents and employees to commit criminal trespass upon the subject real property and to unlawfully remove personal property from the subject premises upon which the Plaintiff held a valid possessory lien, and lawful interest in the said personal property.

XIII.

By reason of said tortious, unlawful, wilful and wanton criminal acts on the part of the Defendants and each of them, Plaintiffs have sustained Actual and Compensatory general damages in an amount which cannot now be definitely ascertained at this time, but which will be established at the time of trial; that Plaintiffs have further sustained the following special damages as a direct, natural and reasonable consequence of the wrongful

and illegal acts of the Defendants, as aforesaid; to-wit;

I. Expense of Litigation:

a. Attorney fees (past, present and future);

b. Appraisal fees, expert witness fees and expenses; (past, present and future);

c. Laboratory fees;

d. Engineering fees;

e. Salaries and fees for investigators and employees; to develop and prosecute this lawsuit;

f. Xerox costs;

g. Secretarial costs;

II. Business Losses:

a. Injury to business, loss of time - seven years of doing business;

b. Injury to financial standing;

c. Destruction of business;

d. Impairment of (future) earning capacity;

e. Depreciation in value of real property;

f. Loss of interest on revenue derived from subject real property;

XIV.

At all times hereinabove alleged the "Individual" defendants pursued in a common Plan, Scheme, and purpose, and tortiously, illegally and unlawfully, conspired with each other, and committed overt acts, to-wit: counseled, encouraged, advised, directed, ratified, sanctioned, covered up, ignored, suffered and permitted, and otherwise aided and abetted in the commission of the tortious, illegal, unlawful, and criminal trespass and expropriation of subject real property and the tortious, fraudulent and illegal conversion of the plaintiffs' real and personal property.

XV.

That the Defendants specifically named, City of Phoenix and California Portland Cement Company and its agent Arizona Sand and Rock and the other fictitiously named individual defendants, in doing the things hereinabove set forth acted wilfully, knowingly, unlawfully and in disregard of Plaintiffs' rights; and notwithstanding repeated protests and notices to cease and desist from all such acts and conduct; that said defendants conduct was therefor oppressive and malicious and for the express purpose of injuring the plaintiffs in the pursuit of their lawful business and affairs without just cause or excuse by reason of which Plaintiffs were entitled to exemplary or punitive damages to be fixed at the time of trial.

XVI.

Plaintiffs have no plain, speedy or adequate remedy at law since the damages caused by the defendants repeated and continuous tortious, illegal and unlawful acts are extremely difficult or practically impossible to ascertain at this time, and said acts if permitted to continue, will cause irreparable injury and that to attempt to obtain redress in damages would require a multiplicity of court actions.

WHEREFORE Plaintiffs demand judgment against the Defendants jointly and severally as follows:

1. For an order directing the Defendants and each of them to show cause why possession of the subject real property should not be surrendered to the Plaintiffs forthwith;

2. For an injunction restraining the defendant, City of Phoenix, and its

agents, servants, employees, and invitees; and any other corporations, partnership, or persons acting by, through or under its direction, permission or authority, from entering plaintiffs real property or any part thereof for any purpose whatsoever; and from in any way interfering with Plaintiffs' possession, use and enjoyment of said real property; hereinbefore described;

3. That the Defendants be permanently enjoined and restrained from trespassing upon the subject real property and from mining and removing sand and gravel therefrom, and from dumping garbage upon the said premises and from the construction of any purported improvements or facilities upon said real property.

4. For judgment against defendants and each of them, jointly and severally for all actual and compensatory damages

shown at trial to have been suffered or sustained by Plaintiffs and each of them.

5. For judgment against defendants, and each of them jointly and severally, for all special damages shown at trial to have been suffered or sustained by Plaintiffs and each of them.

6. For judgment against Defendants, John Doe I through for punitive damages in the amount to be determined at time of trial.

7. For an Order of this Court directing the Defendants, City of Phoenix and California Portland Cement Company, and its agent Arizona Sand and Rock to account for all material removed from said premises; together with all sums of money received from the gross sale or disposition of all processed sand and gravel or other materials, mined, processed, manufactured and transported

from the subject real property.

8. For an order of this Court directing the Defendant, The City of Phoenix, to make a formal written accounting of the total number of tons of garbage that it has allowed, permitted or caused to be dumped upon the subject real property, together with the total amount of money received therefrom in dumping fees, and for a further accounting for all the sand and gravel and other material which it has removed, or caused and permitted to be removed from the subject real property by or under its authority or direction, to and for its use and benefit, or benefit of others without receiving payment therefor;

8. For a Judgment against the Defendants, jointly and severally, for interest at the rate of six (6) percent per annum on the dollar amount of the

process sand and gravel material and manufactured products that were sold, said interest being payable from the actual date of sale, until paid.

9. That the Court or jury determine that the individual defendant spouses, were at all times acting for and on behalf of and in the furtherance of the interest of their respective marital community.

10. That the Court or Jury determine that the Defendants name specifically John Doe 1, John Doe 2, John Doe 3, acted wilfully, wantonly, maliciously, and intentionally in their tortious and illegal action against the Plaintiffs.

11. For such other and further relief as may be meet and proper in the premises; and

12. For Plaintiffs' costs herein incurred or expended.

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Leon S. Jacobs, Esq.

/s/ Herbert Mallamo
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/s/ Francis J. Brown
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Phoenix, Arizona 85015
In Propria Persona

STATE OF ARIZONA)
) ss.
Maricopa County)

JAMES B. CARR, being first duly sworn upon his oath, deposes and says:

That he is President of Del Rio Land, Inc., Plaintiff in the above entitled matter; that he has read the foregoing Complaint and knows the contents thereof; that the matters and things therein alleged are true and correct to the best of his knowledge, information and belief.

/s/ James B. Carr
James B. Carr

Subscribed and sworn to before me this 29th day of August, 1978.

/s/ Cynthia H. Yacks
Notary Public

My Commission Expires:

My Commission Expires April 24, 1982

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEL RIO LAND, INC., Plaintiff,	NO. C 374196
v.	PLAINTIFF DEL RIO LAND, INC.'s MOTION FOR SUMMARY JUDGMENT AND MEMROANDUM IN SUPPORT THEREOF (Oral Argument Requested)
CITY OF PHOENIX, et al., Defendants.	

Plaintiff DEL RIO LAND, INC., a corporation, moves the Court to enter Summary Judgment against Defendant CITY OF PHOENIX, pursuant to Rule 56(c), Rules of Civil Procedure, on the ground that there is no genuine issue of any material fact and that Plaintiff is entitled to judgment as a matter of law.

This Motion is made and based upon the pleadings files and records herein: the Judgment of Dismissal dated July 10, 1976, and entered July 12, 1976, together with the Judgments, Orders and/or Decrees

purportedly made and entered in Cause No. C 250156 - City of Phoenix vs. Del Rio Land, Inc., et al, Superior Court, Maricopa County, Arizona, and Memorandum in Support of Motion attached hereto.

DATED this 4th day of April, 1979.

MOLLOY, JONES, DONAHUE, TRACHTA, CHILDERS & MALLAMO, P.C.

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MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I

STATEMENT OF FACTS

The instant action is the product of a Complaint in eminent domain filed by the City of Phoenix ("Phoenix"), Defendant herein and Plaintiff in Cause No. C-250156, on July 8, 1971. By this Complaint, Phoenix sought to condemn a certain parcel of land owned in fee simple by the Defendant Del Rio Land, Inc.[1] ("Del Rio") and in which numerous other Defendants may have had an interest.

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[1] The clarity of Del Rio's title to this parcel in fee simple absolute was only recently established. In Civil actions related hereto, Cause Nos. C-219831 and C-233593 (consolidated), the Court of Appeals entered an order dated January 25, 1978, whereby Del Rio's ownership was finally determined. Only then did Del Rio acquire sufficient legal interest to challenge the condemnation decree of January 28, 1976.

Del Rio filed a timely answer but, more than one year after the filing of the Complaint, Phoenix had not moved to set the cause for trial. Accordingly, on July 14, 1972, Judge Philip W. Marquardt (to whom the case had been assigned) entered a minute entry order placing the case on the inactive calendar for dismissal on September 18, 1972 unless a certificate of readiness was filed or judgment entered in the interim. Phoenix moved to have the cause continued and Judge Marquardt granted the motion by minute entry order on September 15, 1972, continuing the case on the inactive calendar until November 17, 1972. By November of 1972, Phoenix was still unprepared for trial and Judge Marquardt granted Phoenix's second Motion for Continuance by minute entry order dated November 16, 1972. This Order continued the case on the

inactive calendar to January 16, 1973, but more than one year after that date, Phoenix was still not ready for trial. Thus, on January 18, 1974, Judge Marquardt entered an unsigned minute entry order "dismissing this cause." No formal written order accompanied this minute entry. This omission, however, was corrected on July 10, 1974 when Judge Marquardt signed a formal written order dismissing the case without prejudice for lack of prosecution. This Order was filed with the Maricopa County Clerk on July 12, 1974. A confirming minute entry order, dated July 10, 1974, accompanied this formal Order. No appeal was ever taken from this Order of Dismissal, nor did Phoenix file a Motion to Vacate the Order.

However, the next document appearing in the court file is a handwritten minute entry order dated July 18, 1974

filed under Judge Marquardt's name. This unsigned entry ordered "setting aside dismissal and reinstating this matter on the active calendar as of this date." No formal written order accompanied this entry. This minute entry order, purporting to vacate the July 10 formal written order, was the basis for the subsequent condemnatio trial, consuming 20 minutes on January 5, 1976, and for the final decree in condemnation signed by Judge A. Melvin McDonald. This final decree was entered with the Clerk on January 28, 1976. Del Ric neither appeared nor was represented by counsel at the condemnation trial.

II

ARGUMENT

A. Preliminary Statement

It is the contention of Del Rio that the formal written order of July 10, 1974 signed by Judge Marquardt and entered with

the Clerk, is conclusive in this action. This being so, the Final Decree in Condemnation is void, Del Rio continues to be the owner in fee simple of the subject parcel, and Phoenix is liable for damages resulting from its destructive use of Del Rio's property under color of this void decree.

Initially, it is notable that Summary Judgment will be entered if there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), Ariz. R. Civ. P.; Dutch Inns of America, v. Horizon Corp., 18 Ariz. App. 116, 500 P.2d 901 (1972). There can be, however, no dispute about facts established, as here, solely by the nature of certain documents filed with the court. The law applicable to those facts is discussed below.

B. The Minute Entry Order of July 18, 1974 Had No Effect and This Court's Final Decree in Condemnation is Void.

Dismissal of a complaint for want of prosecution is conditionally mandated by Rule V(d), 17 A.R.S., Uniform Rules of Practice of the Superior Court, which reads as follows:

> "(d) Inactive Calendar. The clerk of court or court administrator shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served and filed within one year after the commencement thereof. All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such two month period;
>
> (1) A proper Motion to Set and Certificate

> of Readiness is served and filed; or
>
> (2) the court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal.

An order of dismissal without prejudice for lack of prosecution has consistently been held to be an appealable order, since it effectively determines the action and prevents final judgment from which an appeal might be taken. Campbell v. Deddens, 93 Ariz. 247, 250, 379 P.2d 963, 965 (1963); Edgar v. Garrett, 10 Ariz. App. 98. 101, 456 P.2d 944, 947 (1969); A.R.S. §12-2101(D), as amended. However, a Rule V(d) order of dismissal, although appealable, is not effective for purposes of appeal until it has satisfied the requirements of Rule

58(a), Ariz. R. Civ. P.; i.e., the judgment must be (1) in writing; (2) signed by a judge; and (3) filed with the clerk. As declared by Justice Struckmeyer,

> "It is our conclusion, therefore, that in all those instances specified as appealable in A.R.S. §12-2101 no order of the superior court is effective until the action taken complies with the directions prescribed in Rule 58(a)." State v. Birmingham, 96 Ariz. 109, 112, 392 P.2d 775, 777 (1964).

It is evident that the July 10, 1974 Order of Dismissal meets the standards imposed by both statute and rule. This order, made appealable by the provisions of Subsection D, A.R.S. §12-2101, was in writing, signed by Judge Marquardt and filed with the clerk. Thus, under Rule 58(a), the order was both appealable and effective, and Phoenix's failure either to move to set it aside or to take timely

appeal therefrom, would, ordinarily, render this judgment conclusive; i.e., terminate the cause for all purposes. Paul v. Paul, 28 Ariz. 598, 238 P. 399 (1924); Edgar, supra, at 101, 947. See also, Jackson v. Pacific Investment Co., Inc., 94 Ariz. 416, 385 P.2d 708 (1963).[2] This consequence would obtain whether the dismissal was "right or wrong". Byers v. Comers, 50 Ariz. 134, 135, 70 P.2d 330 (1937).

However, on July 18, 1974, six days after entry of the appealable Order of Dismissal, an unsigned Minute Entry Order, purporting to vacate the July 10 order, was docketed with the clerk. It was this later order (assumed for purposes of this

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[2] In contrast, Judge Marquardt's Minute Entry Order of Dismissal, dated January 18, 1974, was not in appealable form so that any appeal therefrom would have been premature. Phoenix Western Holding Corp. v. Gleeson, 18 Ariz. App. 60, 500 P.2d 320 (1972).

Motion only to have been entered at Judge Marquardt's direction), which allowed the cause to proceed to trial and eventual condemnation of Del Rio's land. Thus, if the July 18 order was void, this Court lost jurisdiction to act in Cause No. 250156 after July 10, 1974, and any subsequent decree, including its 1976 Final Decree in Condemnation, was equally void.

> "'Of course, the effect of a dismissal, where the answer seeks no affirmative relief, and which is made under the provisions of the Code, as was done in this case, is ipso facto to terminate the case and oust the court of jurisdiction to proceed. (Citing cases).
>
> It follows that, although the court had previously possessed jurisdiction over the persons and the subject matter of the suit in question, such jurisdiction had been completely lost. Hence the judgment rendered

> and all other steps taken subsequently to the dismissal of the action are void for want of jurisdiction.'" Keenan Pipe and Supply Co. v. Superior Court, 94 Ariz. 307, 309, 383 P.2d 864, 866 (1963), citing Smurda v. Superior Court, 266 P. 843, 845 (Cal. App. 1928).

See also, Crawford v. Crawford, 20 Ariz. App. 599, 600, 514 P.2d 1050, 1051 (1973). For the reasons set forth below, the July 18 Order was void.

Any "special order" made after a final judgment has been entered is appealable to the Court of Appeals from the Superior Court. A.R.S. §12-2101(C). An order setting aside an order of dismissal has been ruled to be "special" within the meaning of §12-2101(C). Young Mines Co. v. Blackburn, 22 Ariz. 199, 196 P. 167 (1921)[3]; Edgar, supra, at 98

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[3] The Supreme Court in Young Mines Co.,

99, 944, 945. See also, Bateman v. McDonald, 94 Ariz. 327, 385 P.2d 208 (1963); Hanen v. Willis, 8 Ariz. App. 175, 444 P.2d 732 (1968). The July 18 Order setting aside the July 10 formal written Order of Dismissal was therefore substantively appealable. But as previously noted, this Order could be effective only if it satisfied the requirements of Rule 58(a). State v. Birmingham, supra; Yaeger v. Vance, 20 Ariz. App. 399, 513 P.2d 688 (1973); Sahlin v. American Casualty Co. of Reading, Pa., 5 Ariz. App. 126, 133, 436 P.2d 606 (1968). See also, Hamilton Mines Corp. v. Price, 14 Ariz. App. 186, 481 P.2d 872 (1971). Clearly, it did not.

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[3] supra, was asked to interpret the effect of paragraph 1227, subdivision 2, Revised Statutes of 1913. This section is the predecessor of A.R.S. §12-2101. Engineers v. Sharpe, 117 Ariz. 413, 573 P.2d 487 (1977).

The minute entry was neither a writing nor signed by the judge. Our Supreme Court has concluded on several occasions that an appealable minute entry order which is not accompanied by a formal written order is void. Miller v. Arizona Bank, 45 Ariz. 297, 43 P.2d 518 (1935); Chiricahua Ranches Co. v. State, 44 Ariz. 559, 39 P.2d 640 (1934). The July 18 Order, however, does not fall only for want of technical compliance with Rule 58. Its failing is substantive as well.

The July 18 minute order was entered by the court sua sponte. No notice or opportunity to be heard was given to any of the parties by the court prior to the date of its entry. Only after the order was filed with the clerk was Del Rio made aware that the final Order of Dismissal had been set aside. As a result, Del Rio's property was taken without due

process of law.

In Arizona, the power of a court to affect a final judgment determing the rights and liabilities of parties is carefully controlled. The court can act on its own initiative after entry of final judgment under the authority of only two Arizona Rules of Civil Procedure - Rule 59(g) (grant of new trial within 15 days of entry) and Rule 60(a) (correction of clerical mistakes). All other rules allowing such relief, including Rule 60(c), require action by the parties. "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Rule 60(c), Ariz. R. Civ. P. Of course, a court may vacate a void judgment at any time without being requested to do so. Schuster v. Schuster, 75 Ariz. 20, 251 P.2d 631 (1952); City of

Flagstaff v. Babbit, 8 Ariz. App. 123, 443 P.2d 938 (1968).

The July 18 order clearly was not entered to correct a clerical mistake in the July 10 final judgment. See, for example, Hatch v. Hatch, 113 Ariz. 130, 547 P.2d 1044 (1976). The trial court thus derived no authority from Rule 60(a). Nor does Rule 59(g) apply. By its own description and under Arizona case law, the July 18 order was a special order entered after final judgment -- not an order granting a new trial. Young Mines Co., supra; Edgar, supra; A.R.S. §12-2101(C). Accordingly, the rules relating to new trials provide the court with no source of power to vacate the July 10 judgment of its own accord.[4] Appellate courts which have

[4]Since Rule 59 has no application here,

considered this point agree.

In Brown v. Triple "D" Drilling Co., Inc., _____ Kan. _____, 585 P.2d 987 (1978), the holder of a note filed a collection action against the corporate promissor and a co-signer named Fitzpatrick. Fitzpatrick answered and filed a crossclaim, but the corporation defaulted. No action was taken on Fitzpatrick's answer. Instead, the holder attempted to execute on his default judgment against the corporation. However, the writ was returned unsatisfied. No further action was taken until three years later when a journal entry order was entered dismissing the action without prejudice for lack of prosecution. No

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[4] discussion of the failure of the court to comply with Rule 59(m) by specifying the grounds on which a new trial is granted is unnecessary. (See Reeves v. Markle, 119 Ariz. 159, 579 P.2d 1382 (1978); Yoo Thun Lim v. Crespin, 100 Ariz. 80, 411 P.2d 809 (1966).

appeal was taken from this order, but four months later an entry prepared by the holder's attorney, and signed by the judge, reinstated the cause as to Fitzpatrick. No notice of the court's action was given until after the entry was filed. Fitzpatrick's motion to set aside the Court's ex parte order was denied. The Supreme Court reversed.

Noting that the Kansas rule in question was adopted from Federal Rule 60(b) (Arizona's Rule 60(c)), the court found the order of reinstatement void unter two separate theories. First, it concluded that the trial court possessed the authority under the questioned rule to grant relief from a final judgment only after a motion requesting such relief had been filed. Additionally, the court responded to Fitzpatrick's due process argument in the following manner:

"An order dismissing an action for lack of prosecution is a final order unless and until it has been set aside on motion as prescribed by [Kansas rule of procedure] or by an independent action. The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case (citing cases). The order of the trial court reinstating the action against the defendant, K.N. Fitzpatrick, was entered sua sponte without notice and without an opportunity to be heard or defend. We agree that this did not afford the defendant due process of law.

* * *

Accordingly, the action of the trial court of its own initiative was outside the authority granted by [Kansas rule of procedure] and was ineffective. The court had no jurisdiction to

> set aside the order entered two years, three months, and twenty-eight days before or to reinstate the action on its own initiative without notice and opportunity to be heard." Brown, supra, at 990.

Accord, State ex rel. AAFCO v. Lake Superior Court, 263 Ind. 233, 328 N.E.2d 733 (1975). See, Dickson and Associates v. Brady, 530 S.W.2d 886 (Tex. Civ. App. 1975).

A case whose facts are more closely allied with those presented here is Fiber Crete Homes, Inc. v. Division of Administration, State Dept. of Transp., 315 S.2d 492 (Fla. App. 1975). In that case, an eminent domain action was filed by the Florida Department of Transportation. After trial, the court entered final judgments in favor of the defendant landowners with regard to certain parcels

of land. Within ten days of entry of these judgments, the Department filed motions for new trials, which the trial court denied. The Department then moved for a rehearing of its motions, which was likewise denied, but the court, sua sponte, amended its earlier order and granted new trials to the Department based on a case presented in the motion for rehearing. The landowners appealed to the Florida Court of Appeals, which said:

> "It appears that the trial court's sua sponte order (after its denial of rehearing) was an effort on its part to grant relief from a final judgment because of what the trial court perceived to be a judicial error as distinguished from 'mistake, inadvertence, surprise or excusable neglect.' (Footnote omitted.) To sanction such a modification . . .

> would not only be contrary to the purpose of that rule but, additionally, would adversely affect the concept of 'finality' of any judgment or order.
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> It follows, therefore, that the order of July 10, 1974, granting a new trial is a nullity and, accordingly, is vacated and set aside." Id., at 493, 494.

Accord, Duff v. Duff, 256 Cal. App.2d 781, 64 Cal. Rptr. 604 (1967).

While no Arizona court has yet ruled on this precise question,[5] the foregoing authorities make obvious the invalidity of the July 18 order because of both the

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[5] Cf. Edgar v. Garret, 10 Ariz. App. 98, 456 P.2d 944 (1969) (failure to serve on opposing counsel a copy of a motion to set aside an order of dismissal for lack of prosecution held a denial of due process.) Rico Consol. Mining Co. v. Rico Exploration Co., 23 Ariz. 389, 204 P.138 (1922) (judgment modifying previous final judgment on the merits, but entered without notice to all parties held void for lack of jurisdiction.)

action of the court sua sponte and the absence of either notice to Del Rio or an opportunity to be heard prior to entry of this order. Since the court acted beyond its jurisdiction, the order setting aside the final judgment is void (Preston v. Denkins, 94 Ariz. 214, 382 P.2d 686 (1963); Edgar, supra; see also, State ex rel Pickrell v. Downey, 102 Ariz. 360, 430 P.2d 122 (1967). As such, the order is subject to attack at any time and must now be set aside. Preston, supra. Accordingly, the final decree of condemnation entered on January 28, 1976 by the court in Cause No. 250156 is a nullity and, as a matter of law, Del Rio must be adjudged the owner in fee simple of the subject land.

C. The July 10, 1974 Formal Written Order of Dismissal is Conclusive

and Unaffected by Other Documents Filed Prior to its Entry.

On February 5, 1979, Del Rio filed seven Requests for Admission which had been propounded to Phoenix. The first of these requested admission that the July 10, 1974 Order was an appealable order. Phoenix denied this request, arguing that the Order was entered "in error" for three reasons:

(1) On June 18, 1974, Judge Doyle directed entry of a minute order removing the matter from the "dismissal calendar", precluding entry of the July 10 Order;

(2) Phoenix had filed a Motion to Set on or about June 25, 1974; and

(3) The July 18, 1974 minute entry effectively set aside the July 10 Order.

Since the July 18 minute entry is void (see section B hereof), a successful challenge to the July 10 Order

must be based upon the filing of either the June 18 minute entry or the June 25 Motion to Set. The effect of each of these documents is treated below.

1. Judge Doyle was without jurisdiction to enter the June 18 Order.

The judicial branch of Arizona's government was established by the Constitution of the State of Arizona, Article VI, Sections 1-40. Pursuant to its power under Article VI, Section 5 to "make rules relative to all procedural matters", the Supreme Court adopted the Uniform Rules of Practice of the Superior Court, including Rule XVI relating to Maricopa County. Subsection (d) of this rule reads, in part,

> "All cases filed with the clerk of the superior court shall be assigned a trial division number by the court administrator, which division will thereafter process the case to

> to conclusion except upon order of the presiding judge or the judge to whose division that case has been assigned . . ."

These rules have the force and effect of statutes and their violation is a violation of law. Preston v. Denkins, supra, 94 Ariz. at 217, 382 P.2d at 689; Kinman v. Groasky, 46 Ariz. 191, 49 P.2d 624 (1935). Morever, disregard of the rules of court can, under some circumstances, deprive a court of its jurisdiction to act. In California, where the constitutional origins for its superior court system are virtually identical to those in Arizona (compare Constitution of the State of California, Art. VI, Section 6, with Constitution of the State of Arizona, Article VI, Section 5), the Supreme Court declared that

"[W]here a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. (Citation omitted.) In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. (Citation omitted.) If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anamolous situation and doubtless lead to much confusion." Williams v. Superior Court, 14 Cal.2d 656, 662, 96 P.2d

334, 337, 338 (1939).

This conclusion is clearly consistent with the language of Rule XVI(d) which requires the trial division to which the case was assigned to "process the case to conclusion" unless otherwise ordered by either the presiding judge or the judge of the assignee division.

In the instant action, Judge Doyle attempted to supersede Judge Marquardt's January 18 Order of Dismissal when he ordered the case removed from the "dismissal calendar." The cause was not assigned to Judge Doyle, nor was he authorized to act by order of either the presiding judge or Judge Marquardt, to whom the case had been assigned. The June 18 Order reinstating the case on the active calendar was, of course, not a "final disposition" within the meaning

of Williams. Consequently, entry of the June 18 minute entry Order was beyond Judge Doyle's jurisdiction, and that Order is void.

2. The Filing of the June 25 Motion to Set Was Improper.

On January 18, 1974, Judge Marquardt dismissed the condemnation action by minute entry Order, presumably for lack of prosecution. This entry, however, was unaccompanied by a formal written order. As a result, the case remained on the inactive calendar even though the court had previously ordered it dismissed. Blech v. Blech, 6 Ariz. App. 131, 430 P.2d 710 (1967). The inactive status of the case was unchanged by entry of Judge Doyle's June 18 Order since, as was above demonstrated, that Order was void for want of jurisdiction. Thus, the case had been continuously listed

on the inactive calendar from November 16, 1972 until June 25, 1974 when Phoenix filed its Motion to Set and Certificate of Readiness. This filing clearly did not comply with Rule V(d) which requires automatic dismissal of a case remaining on the inactive calendar for two months unless the Motion to Set is served and filed "prior to the expiration of such two month period." Phoenix had waited to file this motion for almost two years and, consequently, the filing of the motion and certificate was improper. The Colorado Court of Appeals so held in Radinsky v. Karras, 511 P.2d 953 (Col. App. 1973). (See, also, Feingersh v. Lutheran Hosp. Soc. of So. Calif., Cal. App.3d 406, 136 Cal. Rptr. 155 (1977), where plaintiff's failure to bring his case to trial more than six months after a Certificate of Readiness

was filed permitted dismissal for lack of prosecution.)

In sum, the July 10 Order of Dismissal was both proper and valid since Judge Doyle's June 18 Order and the January 25 Motion to Set has no effect. But even if these documents were found to be effective, their presence in the case file did not deprive the July 10 Order of its validity. Our courts have long recognized the inherent power of a trial court to dismiss an action for lack of prosecution.

> "It is an inherent right of the courts, and therefore one existing independently of any statute, to dismiss a suit for failure to prosecute it with due diligence." Brown v. Haymore, 43 Ariz. 466, 469, 32 P.2d 1027, 1028 (1934).

See, also, Cooper v. Odom, 6 Ariz. App. 466, 433 P.2d 646 (1967).

While the Arizona case law cited above is controlling, its conclusions are by no means isolated. See, for example, Cameron v. Cameron, 110 Cal. App.2d 258, 242 P.2d 408 (1952); Vladu v. State, 175 Cal. App.2d 50, 345 P.2d 302 (1959). This rule obtains regardless of whether it is shown that the defendant is prejudiced by the plaintiff's delay. Lieb v. Lager, 9 Cal. App.2d 324, 49 P.2d 886 (1935). It is also the rule in California that the failure to comply with the requirements of rules regarding dismissal of a case for lack of prosecution raises procedural, and not jurisdictional, issues. Nail v. Osterholm, 3 Cal. App.3d 682, 91 Cal. Rptr. 908 (1970).

In the present case the Complaint in Eminent Domain was filed on July 8, 1971. More than one year later, Phoenix

received its first notice that the case would be dismissed for failure to prosecute when Judge Marquardt placed the action on the inactive calendar for dismissal. Judge Marquardt later recanted by twice continuing the cause on the inactive calendar. The later of these two minute entries, dated November 16, 1972, extended the inactive status "until January 16, 1973". For more than one year after entry of this Order, Phoenix did nothing to bring the case closer to trial.[6] Under such circumstances, Judge Marquardt was fully justified in exercising his inherent power to dismiss the case, notwithstanding the validity of the two previously discussed documents. Moreover,

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6 Between entry of the November 16, 1972 minute Order of Continuance and the January 18, 1974 minute Order of Dismissal, Phoenix moved only to take immediate possession of Del Rio's Land.

the Court's exercise of this inherent authority will be overturned only upon a demonstration that the Court abused its discretion. Cooper v. Odom, supra.

For purposes of this Summary Judgment Motion, however, the importance of this Arizona rule rests more soundly on its confirmation of Judge Marquardt's power to enter the July 10 Order than on its verification of the Order's validity.

> "It is fundamental that where, as here, the lower court has jurisdiction of the matter it has the power to determine and decide the matter which includes the power to decide it wrong as well as to decide it right. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong." Greater Arizona Savings & Loan Assoc. v. Tang, 97 Ariz. 325, 327, 400 P.2d 121, 123 (1965).

See, also, Duncan v. Truman, 74 Ariz. 328, 331, 248 P.2d 879, 882 (1952); City of Phoenix v. Greer, 43 Ariz. 214, 29 P.2d 1062 (1934); Goff v. Superior Courts, 2 Ariz. App. 334, 409 P.2d 16 (1965). Once the jurisdictional base for the July 10 Order was established, it became incumbent on Phoenix to either move to set aside the Order or take an appeal. See Paul v. Paul, supra; Edgar, supra, Phoenix did neither, and this failure renders the July 10, 1974 Order conclusive in this case. All decrees entered thereafter, including the final Decree of Condemnation, were coram non judice.

CONCLUSION

Since the July 18 minute entry order is void, all decrees entered subsequent thereto, including the Final Decree of Condemnation entered by the Court in

January of 1976, are likewise void. The status of the court record on July 10, when the case was formally dismissed, does not alter this result. Accordingly, as a matter of law, Del Rio must be adjudged the owner in fee simple of the subject land.

Respectfully submitted this 4th day of April, 1979.

MOLLOY, JONES, DONAHUE, TRACHTA, CHILDERS & MALLAMO, P.C.

By /s/ Herbert Mallamo
Herbert Mallamo
Attorneys for Del Rio

STATEMENT OF ISSUES PRESENTED

1. Whether the formal order of dismissal signed by the lower court on July 10, 1974, and entered with the Clerk on July 12, 1974, validly and effectively dismissed the complaint in eminent domain filed by Phoenix on July 8, 1971?

2. Whether the July 18, 1974 minute entry, which purported to reinstate the action to condemn Del Rio's land and every order, judgment and decree entered thereafter by the lower court, including the judgment in condemnation dated January 23, 1976, as amended on September 8, 1976, and the decree in condemnation dated January 28, 1976, as amended on September 8, 1976, are void?

3. Whether the August 29, 1978 complaint filed on behalf of Del Rio is barred by and must be dismissed on the basis of the doctrine of res judicata or of collateral estoppel?

ISSUES PRESENTED FOR REVIEW

1. Did the errors committed by the trial court deprive the Appellants of Due process of law and their day in court and the right to have a jury trial on the issues of fact raised in their;

    1) Rule 60(a) "Motion to Correct Clerical Error";

    2) Rule 60(c) "Motion to Vacate Void Judgments"?

2. Did the trial court err in refusing to grant Plaintiffs Appellants Motion for Summary Judgment based upon the state of the record, that conclusively showed that there was no valid dispute as to any material fact and that the Appellants were entitled to summary judgment as a matter of law?

3. Did the trial court err in granting summary judgment for Appellees based upon the state of the record in cause C219831, C250156 and C319348, and the controverting

affidavits filed by Appellants that showed there were valid disputes of material facts, opposing the Defendants grounds for summary judgment.

4. That the trial court erred and was premature in dismissing Plaintiff-Appellants Francis J. Brown, five (5) motions direct against the Defendants answer.

DUE PROCESS OF LAW

The Fourteenth Amendment to the United States Constitution and Art. 2 § 3 of the Constitution of Arizona, commonly referred to as the "Due Process Clause" states:

> "No person shall be deprived of life, liberty or property without due process of law."

Due process of law requires that every person shall have the protection of his day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders its judgment after trial on the issues. (Traux v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L. Ed. 254.)

Judge Heineman acted in excess of his jurisdiction in this matter and denied plaintiffs due process of law.

Before this court can deal with the merits of the appeal the court must first have before it an accurate record of the proceedings in the Superior Court. Any

error, mistake, or omission in the record of that court must be corrected in that Court, before this court renders its decision on this appeal. (State of North Carolina v. Olds, (1967) 271 NC 341; 156 S.E. 2d 756.)

Conclusion:

The Appellants are entitled to have the trial courts order vacated setting aside the denial of their Rule 60(a) Motion to Correct the Record, with direction that the court has no discretion it must submit the issues of fact to a jury regarding the forged minute order dated July 18, 1974.